

Date of Hearing: April 1, 2014

ASSEMBLY COMMITTEE ON AGING AND LONG-TERM CARE

Mariko Yamada, Chair

AB 2171 (Wieckowski) – As Introduced: February 20, 2014

SUBJECT: Residential care facilities for the elderly (RCFE); resident rights.

SUMMARY: Establishes a resident's bill of rights and a mechanism to enforce them. Specifically, this bill:

- 1) Expresses legislative intent to:
 - a. Enhance each RCFE resident's autonomy and strengthen an RCFE resident's ability to make choices about care, treatment and daily life;
 - b. Adopt fundamental rights for people residing in RCFEs, and to provide residents the ability to enforce them;
 - c. Encourage facilities to respect and promote those rights, and treat residents with dignity and kindness;
 - d. Ensure that every RCFE provide a safe comfortable and homelike environment for its residents;
 - e. Ensure that RCFEs protect residents from any type of physical or mental abuse, neglect, restraint, exploitation, or endangerment.
- 2) Establishes definitions for:
 - a. "Chemical restraint" which means drugs that are used for discipline or convenience but not required to treat a medical condition.
 - b. "Inappropriate use of psychoactive drugs" means a drug given to a resident without first obtaining consent to administer the drug, for discipline, or convenience, or to treat symptoms for which no physician has authorized administration, or without documentation of appropriate nonpharmacological methods.
 - c. "Physical restraint" means methods or devices, material or equipment that restricts a resident from movement.
 - d. "Psychoactive drug" means medication that is used to alter mood, anxiety, behavior or cognitive process.
- 3) Forbids discrimination on the basis of sex, race, color, disability, religion, national origin, marital status, registered domestic partner status, ancestry, actual or perceived sexual orientation or gender identity.

- 4) Establishes a resident's rights which supplement existing constitutional and other rights, which may not be waived, though the exercise of them may be delegated to resident representatives in case of limited capacity, and shall be posted prominently in each facility, and presented upon admission, signed, and entered into the resident's record, to:
- a. be treated with dignity and respect;
 - b. be given privacy;
 - c. be given control over confidential records;
 - d. be encouraged and assisted in exercising their rights;
 - e. be free of coercion, discrimination, and retaliation in the exercise of their rights;
 - f. be given a safe, homelike environment;
 - g. be given individualized care delivered by adequate, competent staff;
 - h. be given good food in adequate amounts;
 - i. be allowed to make choices about their daily life, and participate to the extent possible in their care;
 - j. be allowed to consent to or reject services;
 - k. be free from neglect, exploitation, seclusion, punishment, humiliation, intimidation, verbal, mental, and sexual abuse;
 - l. be free from restraints;
 - m. be free to complain, or recommend changes in policies;
 - n. be allowed to contact licensing authorities, or the long-term care ombudsman;
 - o. be fully informed of rules;
 - p. receive a description of what residents are paying for, itemized;
 - q. be informed of facility resident retention limitations;
 - r. be given reasonable accommodation;
 - s. be given written notice of room changes;
 - t. be allowed to share a room with a spouse or partner;
 - u. be allowed to choose their own physician, or pharmacist;
 - v. be protected from involuntary transfers;
 - w. be allowed to move;
 - x. be visited;
 - y. receive written information about advanced healthcare directives;
 - z. maintain or develop their fullest potential for independent living, through educational activities, planned activities, personal interests, worship and other opportunities for socialization;
 - i. participate in resident councils;
 - ii. to have their property protected;
 - iii. to manage their affairs.
- 5) Creates a mechanism to enforce these rights by allowing a current or former resident to bring an action in a court of competent jurisdiction for injunctive relief against a licensee if a violation of one of these rights results in an immediate or substantial threat to physical health, mental health, or safety of residents, and limits financial liability to \$1000 per day for each violation, and for attorney's fees. The measure stipulates that the right to bring such an action does not expire upon the death of the resident, and that waiving such rights is contrary to public policy, and voidable.

EXISTING LAW:

- 1) Establishes the California Community Care Facilities Act (CCFA) to provide a comprehensive statewide service system of quality community care for people who have a mental illness, a developmental or physical disability, and children and adults who require care or services by a facility or organization.
- 2) Defines a “community care facility” (CCF) as a facility, place, or building maintained and operated to provide nonmedical residential care, day treatment, adult day care, or foster family agency services for children, adults, or children and adults, including, but not limited to, the physically handicapped, mentally impaired, incompetent persons, and abused or neglected children.
- 3) Establishes the California RCFE Act, which requires facilities that provide personal care and supervision, protective supervision or health related services for persons 60 years of age or older who voluntarily choose to reside in that facility to be licensed by DSS. In establishing the RCFE Act, the Legislature finds and declares that a separate licensing category is necessary for a humane approach in meeting the housing, social and care needs of older persons within homelike environments.
- 4) Prohibits any person, firm, partnership, association, corporation or public agency from establishing, operating, managing, conducting or maintaining a CCF or a RCFE without a valid license provided by the Department of Social Services (DSS).
- 5) Provides that any person who violates the CCFA or the RCFE Act shall be guilty of a misdemeanor and upon conviction shall be fined no more than \$1,000, imprisoned in county jail for up to one year, or both.
- 6) Provides for Community Care Licensing (CCL) within the Department of Social Services to promote the health, safety, and quality of life of each person in community care through the administration of an effective collaborative regulatory enforcement system by promoting strategies to increase voluntary compliance, providing technical assistance to and consulting with care providers, working collaboratively with clients, their families, advocates, care providers, placement agencies, related programs and regulatory agencies, and others involved in community care, training staff in all aspects of the licensing process, educating the public about CCL and community care options, and promoting continuous improvement and efficiency throughout the community care licensing system.
- 7) Establishes the office of Long-Term Care Ombudsman (LTCO) program as a result of the federal Older Americans Act (OAA) and places it within the California Department of Aging (CDA) in order to encourage community contact and involvement with elderly patients or residents of long-term health care facilities or residential facilities through the use of volunteers and volunteer programs.
- 8) Requires the LTCO, either personally or through representatives, to identify, investigate, and resolve complaints that may adversely affect the health, safety, welfare, or rights of residents of long-term care facilities.

FISCAL EFFECT: Unknown

COMMENTS:

Author's Statement: "This bill would establish a statutory Bill of Rights that ensures the basic dignity and autonomy of today's RCFE residents. This Bill of Rights includes rights for residents in several areas including visitation, privacy, confidentiality, personalized care, autonomy, informed consent, financial management, freedom from abuse and restraint, adequate staffing and many more. It would also establish a private right of action giving residents the opportunity to enforce their rights when they are being mistreated, and prevent or stop ongoing violations of their rights."

Background: California is home to the largest number of seniors in the nation, and the older population is expanding at an unprecedented historical pace. The California Department of Finance's Demographic Research Unit estimates that California's 65+ population will grow by 43%, from 4.4 million in 2010 to 6.35 million by 2020; another 39%, to 8.83 million by 2030; and an additional 21% to 10.5 million by 2040. The expanding population of older Californians will impact every facet of policy, housing being one of the primary areas, and RCFE growth is reflected in the above describe demographic shift; since 2002, RCFE licenses have increased nearly 30%.

Recent media revealed misconduct, mistreatment, and neglect of dependent elders living within licensed RCFEs. Additionally, over the past several years, the elimination of vacant staff positions, hiring moratoriums, and rolling staff furloughs have challenged the Department of Social Services in its mission to protect vulnerable populations living within facilities that it licenses. These revelations have led many to believe that RCFE residents are increasingly exposed to harm.

Background on RCFE's: RCFEs are licensed, assisted living (non-medical) facilities for persons 60 years of age and over and other, younger persons with similar needs. Varying levels of care and supervision, protective supervision, and personal care such as assistance with hygiene, dressing, eating, bathing, as well as storage and distribution of medications are provided, based upon residents' needs. All RCFEs provide meals and housekeeping. Ongoing medical care is not allowed except in specific cases, although hospice care is allowed. People with ongoing medical needs require a higher level of care in a nursing home or an intermediate care facility.

RCFE care is one of the fastest growing components of the long-term supports and services industries. There are currently 7,570 licensed RCFEs in California serving 176,026 people. According to DSS, approximately 80% of RCFEs are licensed for four-six residents; the remaining 20% of RCFEs have an average capacity of about 60 residents, though facilities can house over 100 people in some cases.

Growth in the number of RCFE Licensees:

| Fiscal Year: | # of Licenses |
|---------------------|----------------------|
| FY 2000-2001 | 6,187 |
| FY 2001-2002 | 6,204 |
| FY 2002-2003 | 6,313 |
| FY 2003-2004 | 6,491 |

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|--------------|-------|
| FY 2004-2005 | 6,730 |
| FY 2005-2006 | 6,992 |
| FY 2006-2007 | 7,334 |
| FY 2007-2008 | 7,707 |
| FY 2008-2009 | 7,847 |
| FY 2009-2010 | 7,822 |
| FY 2010-2011 | 7,681 |
| FY 2011-2012 | 7,695 |

*As of March 14, 2014 there were 7,570 RCFEs operating in California serving 176,026 residents.

Governor's Budget: The Community Care Licensing program within the Department of Social Services serves as the state's licensing authority for RCFEs. The Governor's budget proposed a range of initiatives to address enforcement and oversight of facilities throughout the state, including:

- 1) **Additional positions:** 71.5 positions to assist in CCL enforcement activities include six special investigator assistants, a nurse practitioner, five licensing program managers, and others.
- 2) **Staff training and development** for new field staff, supervisors and managers by expanding the Licensing Program Analyst Academy, implementing ongoing training, and strengthening the Administrator Certification Section.
- 3) **Recognizing the changing needs of clients in RCFEs,** the Governor's budget proposes that DSS will assist with policy and practice development for medical and mental health conditions in community facilities, by establishing medical expertise resources. Although CCL has no staff with medical expertise, DSS licenses facilities that do, allow for incidental medical care.
- 4) **Create a Mental Health Populations Unit** which would provide technical assistance to enforcement staff and licensees, as well as to individuals who reside in facilities who have increasing mental health care needs.
- 5) **Establish a Corporate Accountability Unit** to perform systemic noncompliance analysis and ensure corrective actions; create management reports that identify patterns and trends; make corrective action recommendations; and, follow-up on corrective action plans to ensure that licensees with poor compliance patterns do not support operational expansions.
- 6) **Increased civil penalties,** because the current civil penalty structure is related to a "per violation" event, the current maximum civil penalty, even in response to serious injury or death of a resident, is \$150.
- 7) **Establish a Temporary Manager and Receivership Process** to appoint a temporary manager or receiver to act as the provisional licensee, if DSS determines that residents of a facility are likely to be in danger of serious injury or death, and the immediate relocation of clients is not feasible.
- 8) **Specialized complaint hotline** and centralized toll-free public complaint hotline, which can help acquire better initial information, conduct consistent prioritization, and dispatch incoming complaints to regional offices.
- 9) **Centralized application processing** for Adult and Senior Care facilities, which is expected to increase inspections of licensed facilities to at least once every two years.
- 10) **Establish a statewide Quality Assurance Unit** to track information statewide, including complaints, actions, or performance. It also does not provide aggregate data to review and identify patterns.

- 11) **Establish an Emergency Client/Resident Contingency Account** to be used at the discretion of the Director of DSS for the care and relocation of clients and residents, when a facility's license is revoked or temporarily suspended.

In order to curb the mistreatment of a rapidly growing vulnerable RCFE population, and to assist with the expanding enforcement and oversight responsibilities of the Department of Social Services, the author is proposing a statutory "Bill of Rights," and an enforcement mechanism known as a "private right of action," which will empower RCFE residents, or their representative to sue for injunctive relief and limited damages, including attorney's fees. Rights currently exist within Title 22, Section 87468, regulations that guide facilities and assist the department with enforcement, though there is very little consequence for not adhering to them.

Office of the Long-Term Care Ombudsman: The purpose of the State Long-Term Care Ombudsman is to protect and advocate for the rights, health and safety of long-term care facility residents, oftentimes the elderly. California's State Ombudsman delegates this responsibility to the 35 local ombudsman programs (local area agencies on aging, or "AAAs") throughout the state. The local ombudsman program employees are responsible for making site visits to the facilities in an effort to identify, investigate, and resolve complaints that may adversely affect the health, safety, welfare, or rights of residents of long-term care facilities.

In 2012, the California Long-Term Care Ombudsman Program received over 4,000 complaints regarding resident rights in RCFEs, ranging from access for visitors, neglect, verbal and physical abuse, and issues related to personal dignity, among others.

Private Right of Action in Long-Term Healthcare Facilities: Residents of long-term healthcare facilities (also known as "nursing homes" or skilled nursing facilities), are availed injunctive relief to compel compliance by a licensee with state and other laws related to individual resident rights. California law establishes a statutory bill of rights for nursing home residents in Division 2, Chapter 3.9 of the Health & Safety Code, and supplemented it with a regulatory bill of rights within Title 22 (CCR §72527). For instance, under both federal and California law, nursing home residents have a "right" to be free from physical and chemical restraints, and the inappropriate use of psychoactive drugs, and may sue, or compel and action by the courts, enforce such a right.

Text of Health and Safety Code Section 1430, granting nursing home residents the right to seek injunctive relief:

1430. (a) Except where the state department has taken action and the violations have been corrected to its satisfaction, a licensee who commits a class "A" or "B" violation may be enjoined from permitting the violation to continue or may be sued for civil damages within a court of competent jurisdiction. An action for injunction or civil damages, or both, may be prosecuted by the Attorney General in the name of the people of the State of California upon his or her own complaint or upon the complaint of a board, officer, person, corporation, or association, or by a person acting for the interests of itself, its members, or the general public. The amount of civil damages that may be recovered in an action brought pursuant to this section may not exceed the maximum amount of civil penalties that could be assessed on account of the violation or violations.

(b) A current or former resident or patient of a skilled nursing facility, as defined in subdivision (c) of Section 1250, or intermediate care facility, as defined in subdivision (d) of Section 1250, may bring a civil action against the licensee of a facility who violates any rights of the resident or patient as set forth in the Patients Bill of Rights in Section 72527 of Title 22 of the California Code of Regulations, or any other right provided for by federal or state law or regulation. The suit shall be brought in a court of competent jurisdiction. The licensee shall be liable for the acts of the licensee's employees. The licensee shall be liable for up to five hundred dollars (\$500), and for costs and attorney fees, and may be enjoined from permitting the violation to continue. An agreement by a resident or patient of a skilled nursing facility or intermediate care facility to waive his or her rights to sue pursuant to this subdivision shall be void as contrary to public policy.

(c) The remedies specified in this section shall be in addition to any other remedy provided by law.

Supporters Argue:

According to background provided by the author, the purpose of AB 2171 is to secure a better, safer, more dignified future for RCFE residents in California by strengthening their rights to make choices about their care, treatment and daily life and to ensure that their choices are respected. Additionally, AB 2171 is intended to enhance resident safety and dignity by outlawing dangerous or abusive practices, such as the use of restraints. In so doing, AB 2171 will bring California in line with the best practices in many other states.

AB 2171 allows a resident to seek immediate intervention, in the form of an injunction, to stop a violation of their rights. Given this option, the resident can obtain timely effective relief, perhaps even precluding the need for any CCL action. In other words, a private right of action can overcome the traditional barriers to enforcement of their rights that residents have faced. Perhaps most importantly, a private right of action is meant to empower residents, giving them a resource to better balance a relationship that is often asymmetric in power.

According to background provide by the author, California is very late to respond to the dramatic increase in the use of RCFEs for late-life care of elders with highly compromised health conditions such as dementia, diabetes and Chronic Obstructive Pulmonary Disease (COPD). As the Department of Social Services has acknowledged, the changing role of the RCFE "license" necessitates an overhaul of regulatory roles, structure, and a more sophisticated means to ensure that residents are safe and secure. By establishing a modern bill of rights that fits the needs of today's RCFE residents, AB 2171 will take a major step toward that goal while giving residents and their representatives the abilities to control decisions affecting their lives.

Co-sponsor of AB 2171, The California Advocates for Nursing Home Reform, CANHR, cites an "RCFE care crisis" where rapid growth, inadequate oversight and outdated standards are conspiring to jeopardize some residents. In a report entitled "Residential Care in California: Unsafe, Unregulated and Unaccountable," they describe among other things, a failed inspection system; a broken complaint system; limited and ineffective penalties for violations; and "paper tiger" resident rights provisions that provide no enforcement power to residents, all of which contribute to a system that is unsafe for RCFE consumers, while leaving RCFEs essentially unregulated and unaccountable for their actions. According to CANHR, AB 2171 establishes

strong statutory resident rights, and strengthens a resident's ability to make choices about their care, treatment and daily life while assuring those choices are respected.

Consumer Attorneys of California describes AB 2171 as the linchpin of the package of bills introduced this year to protect seniors and those with disabilities who reside in Residential Care Facilities for the Elderly (RCFE). AB 2171 reflects a model of resident rights and enforcement used by residents in nursing homes for over 30 years. According to this co-sponsor, this mechanism has been effective for nursing homes and their residents and there is no reason these protections should not be as successful in the RCFE system. They argue that unlike nursing homes which are more heavily regulated, RCFEs, by comparison, lack even minimal government oversight and inspections, making this population extremely vulnerable to abuse and neglect.

The California Commission on Aging, an independent state agency made up of gubernatorial and legislative appointees, writes that the lives of RCFE residents are often "limited and bleak," and that a resident's bill of rights is a positive step toward assuring that residents are treated with dignity and respect.

The California Long-Term Care Ombudsman Joseph Rodriguez, and appointee of the Governor with offices within the Californian Department of Aging and the designated principle advocate for older adults living in long-term care facilities believes this bill will help RCFE residents.

The American Association of Retired Persons (AARP) strongly believes that the California state legislature should explicitly provide a private right of action in all legislation intended to protect individual rights, which is at the heart of AB 2171.

Opponents Argue:

The Civil Justice Association of California (CJAC) argues that merging current statutory and regulatory standards with those included in AB 2171 will lead to increased, unjustified litigation against facilities offering care to seniors by creating legal traps enforceable through civil lawsuits with severe penalties, attorney's fees, and an extensive statute of limitations. Though sympathetic to the importance of protecting seniors and other vulnerable adults, they assert that the framework in AB 2171 will needlessly increase litigation and will ultimately result in reduced services for the growing elderly population. As an example, CJAC cites AB 2171's right to be free from discrimination from admission. Yet, under existing law RCFEs are prohibited from accepting or retaining residents that the state determined the facility is not allowed to care for. Also, under AB 2171 a person could seek injunctive relief and damages for example failure to distribute a document describing a residents rights upon admission. They argue that AB 2171's three-year statute of limitations, coupled with a \$1,000 per day fine, could allow for financially devastating consequences for what could be perceived as a technical oversight.

LeadingAge California which represents more than 400 providers of not-for-profit senior care living opportunities, such as affordable housing, continuing care retirement communities, assisted living (RCFE), skilled nursing, and community-based care, is concerned that AB 2171 invites litigation and does little to improve oversight. They cite Title 22's resident rights and is concerned that AB 2171 would add current regulatory requirements as new "rights," and would allow for private enforcement outside of the state's regulatory agency. LeadingAge is also concerned that AB 2171 inserts RCFE caregiving staff into the physician's treatment plan regarding the use of medications. RCFEs do not prescribe medications and under existing law

and practice, all medications must be self-administered. Requiring RCFEs to verify “informed consent” is beyond the scope of the social model of care RCFEs provide.

The California Palliative Care Association (CHAPCA) cites similar concerns with AB 2171. CHAPCA states that they recognize the intent of AB 2171 to help RCFE residents, but hospice provider's core mission is to lessen the suffering and improve the quality of life during the dying process, and frequently require flexibility to meet their clients' needs. Requiring informed consent could create barriers to reducing such suffering if "informed consent" is enforced, and immediate needs for medication to relieve mental anguish, or physical pain from the dying process could be prohibited.

Previous and Related Legislation

AB 2791 (Simitian), Chapter 270, Statutes of 2004, provided for a nearly identical right of action for residents in skilled nursing or intermediate care facilities.

AB 185 (Mello) Chapter 1127, Statutes of 1985, separated licensure of RCFEs from community care facilities.

SB 894 (Corbett) RCFE Suspension/Revocation of Licenses would strengthen and clarify the obligations of the department and the licensee when a license is suspended or revoked and would create timelines for the safe relocation of residents when a facility's license has been suspended or revoked.

SB 895 (Corbett) would require Community Care Licensing to conduct unannounced, comprehensive inspections of all residential care facilities for the elderly at least annually and as often as necessary to ensure the quality of care provided. The inspection must evaluate each facility for compliance with all laws and regulations governing residential care facilities for the elderly.

SB 911 (Block) would increase the qualifications and training requirements for RCFE administrators and staff and require facilities who accept and retain residents with restricted or prohibited health conditions to employ trained medical personnel on a full or part-time basis as appropriate.

SB 1153 (Leno) creates new penalties for non-compliance, including authorizing the Department of Social Services to suspend the admission of new residents in facilities where there is a substantial probability of harm.

SB 1218 (Yee) would increase civil penalties against RCFEs for violations of laws and regulations from the current maximum of \$150. The fines would vary the minimum and maximum penalties, depending on the seriousness of the violation. SB 1218 would also establish the Emergency Resident Relocation Fund, and require 50% of the revenue from the civil penalties to be deposited into the Fund for relocation and care of residents when a facility's license is revoked or suspended.

AB 364 (Calderon) would increase DSS inspections of community care facilities, passed Assembly Human Services Committee on March 25, 2014 on a 7-0 vote.

AB 1554 (Skinner) would require the Department to start and complete complaint investigations in a timely manner, give complainants written notice of findings and provide complainants an opportunity to appeal.

AB 1571 (Eggman) would require that the Department of Social Services/Community Care Licensing establish an on-line RCFE Consumer Information system to include specified updated and accurate license, ownership, survey, complaint and enforcement information on every licensed RCFE in California with components to be phased in over a five (5) year period ending June 30, 2019. This bill also would require complete disclosure of ownership and prior ownership of any type of facility, including NFs, and any similar entity in other states, including history of compliance or non-compliance and require cross check with Department of Public Health (DPH).

AB 1572 (Eggman) will amend current laws to enhance the rights of resident councils and family councils in RCFEs.

REGISTERED SUPPORT / OPPOSITION:

Support

California Advocates for Nursing Home Reform (CANHR) – Co-Sponsor
American Association of Retired Persons (AARP)
California Commission on Aging
California Continuing Care Residents Association
Consumer Attorneys of California – Co-Sponsor
Consumer Federation of California
Elder Abuse Task Force of Santa Clara County
Elder Law & Advocacy
Johnson Moore Trial Lawyers
Long Term Care Services of Ventura County, Inc.
Moran Law
National Association of Social Workers (NASW) California Chapter
National Senior Citizens Law Center
Office of the State Long-Term Care Ombudsman
Ombudsman Services of Contra Costa
Stebner and Associates
Valentine Law Group
WISE & Healthy Aging
Numerous individuals.

Opposition

California Hospice and Palliative Care Association
Civil Justice Association of California (CJAC)
LeadingAge California

Analysis Prepared by: Robert MacLaughlin / AGING & L.T.C. / (916) 319-3990